

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**McDONALD'S USA, LLC, A JOINT EMPLOYER,  
et al.**

**and**

**Cases 02-CA-093893, et al.  
04-CA-125567, et al.**

**FAST FOOD WORKERS COMMITTEE AND  
SERVICE EMPLOYEES INTERNATIONAL  
UNION, CTW, CLC, et al.**

**GENERAL COUNSEL'S REQUEST FOR SPECIAL PERMISSION TO APPEAL and  
APPEAL OF THE ADMINISTRATIVE LAW JUDGE'S ORDER DENYING MOTION  
TO APPROVE SETTLEMENT AGREEMENTS**

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### **Request for Special Permission to Appeal**

Pursuant to 29 C.F.R. § 102.26, the General Counsel (General Counsel) of the National Labor Relations Board (Board) requests special permission to appeal Administrative Law Judge (ALJ) Esposito's order denying the General Counsel's motion to approve settlement agreements reached with Respondents in this proceeding.

In support, the General Counsel asserts the ALJ abused her discretion by rejecting settlements that, if approved, would fully remedy the alleged unfair labor practices (ULPs) and thereby resolve these cases in a manner sought by all Respondents, the General Counsel, and the workers allegedly fired in retaliation for exercising their rights under the National Labor Relations Act (NLRA or Act). The ALJ's order effectively commits the parties to additional likely protracted litigation and the corresponding allocation of more resources to this already years-long litigation. Because this abuse cannot be corrected later, the General Counsel requests that the Board grant his request for permission to appeal and, on the merits of the appeal, reverse the ALJ's order and approve these settlements.

## **Appeal**

### **I. Standard of Review**

When reviewing an appeal on the merits, the Board evaluates the underlying decision to determine whether the Regional Director or, in this case, the ALJ, abused his or her discretion.<sup>1</sup> An ALJ abuses her discretion when she acts arbitrarily, capriciously,<sup>2</sup> or makes errors of law.<sup>3</sup>

Here, the ALJ acted arbitrarily in highlighting certain facts out of context to support her decision and insufficiently crediting the General Counsel's support of the settlements. She also misapplied controlling precedent. She thereby abused her discretion and her decision must be reversed.

### **II. Analysis**

#### **1. Policies of the Act**

The Board recently reaffirmed the standards ALJs should apply in evaluating whether to approve settlement agreements. *UPMC*, 365 NLRB No. 153 (Dec. 11, 2017). In conducting such reviews, ALJs are bound to consider the circumstances in which the proposed settlements arose, guided by the policies underlying the Act:

[I]n evaluating . . . settlements in order to assess whether the purposes and policies underlying the Act would be effectuated by our approving the agreement, the

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<sup>1</sup> *McDonalds USA, LLC*, 363 NLRB No. 92 (Jan. 8, 2016)(applying abuse of discretion standard of review to special appeal of judge's ruling); see also *Kiss Electric, LLC*, 2017 WL 2794211 (NLRB June 27, 2017) (applying abuse of discretion standard in denying General Counsel's appeal of ALJ approval of what Board describes as an informal settlement agreement)

<sup>2</sup> *Pueblo Sheet Metal Workers*, 292 NLRB 855 (1989)(denying special appeal because movant failed to show judge acted arbitrarily or capriciously or otherwise abused his discretion); *Consumers Distrib.*, 274 NLRB 346 (1985)(same).

<sup>3</sup> *Flint Iceland Arenas*, 325 NLRB 318, 319 (1998)(reversing ALJ's approval of settlement agreement because it did not, in the Board's view, satisfy the standards in *Independent Stave*); see also *Koon v. United States*, 518 U.S. 81, 100 (1996)("A district court by definition abuses its discretion when it makes an error of law.");

Board will examine all the surrounding circumstances including, but not limited to, (1) whether the charging party(ies), the respondent(s), and any of the individual discriminatee(s) have agreed to be bound, and the position taken by the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion, or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.

*UPMC*, 365 NLRB No. 153 (Dec. 11, 2017)(quoting *Independent Stave*, 287 NLRB 740, 743 (1987)).

The settlement agreements here are reasonable under *Independent Stave*, 287 NLRB 740 (1987) and, as such, should have been approved by the ALJ. Her failure to do so constitutes a misapplication of that controlling precedent and, thus, an error of law. The Board should therefore reverse her decision and approve these settlements.

## **2. The ALJ Decision**

In her decision, the ALJ agreed with Respondents and the General Counsel that the third and fourth factors favor approval of the settlements. There is no evidence the agreements were tainted by fraud, coercion, or duress, and Respondents have neither a history of violations under the Act nor of breaching previous settlements.<sup>4</sup> While the ALJ found that the first *Independent Stave* factor did not favor approving the settlement, her reasoning also implies that factor does not weigh against approving the settlement.<sup>5</sup> This entails that the ALJ's rejection of the

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<sup>4</sup> The opposite, in fact, is true. As explained in the General Counsel's motion to approve these settlements, see Exhibit B, the General Counsel has closed other cases against some of these Respondents precisely because those Respondents fully satisfied their obligations under the relevant settlement agreements.

<sup>5</sup> General Counsel will also argue the ALJ was incorrect in her evaluation of the first *Independent Stave* factor.

settlements is based entirely on her conclusion that their terms are not reasonable under the second *Independent Stave* factor.<sup>6</sup> An examination of the ALJ's reasons for that conclusion reveals that they are largely based on a misunderstanding of the settlements, a misreading of the statements by General Counsel, or a misapplication of existing law.

### **3. The Positions of the Parties**

The ALJ accurately relayed the parties' general positions on the settlements: the Charging Parties oppose them, while the General Counsel, all Respondents, and the affected workers support them. She erred, however, by insufficiently crediting the General Counsel's support of the settlements, given his unique position as advocate and enforcer of the public interests served by the Act; equating the significance of the positions of the three discriminatees who would cede a potential remedy, viz., reinstatement, in exchange for premium pay not normally available as part of a Board order, with the other discriminatees, who do not give up any remedies or rights under the proposed settlement terms.

First, the ALJ gave insufficient weight to the General Counsel's support of these settlements. As the Board will acknowledge, only in rare instances has it rejected a settlement supported by the General Counsel. This should be no surprise given the General Counsel's role enforcing the Act.

The General Counsel is vested under Section 3(d) of the Act with "final authority . . . in respect of the investigation of charges and issuance of complaints . . . and in respect of the

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<sup>6</sup> Exhibit A, Order Denying Motions to Approve Settlement Agreements, 02-CA-093893 et al. (July 17, 2018) (Settlements Order), p. 18.

prosecution of such complaints before the Board[.]”<sup>7</sup> The General Counsel is also responsible for ensuring parties comply with settlements and defending Board orders in court. He, unlike other parties to Board litigation, is acting on behalf of the public interest.<sup>8</sup> This role is reflected in the informal settlement agreements regularly negotiated by the General Counsel. These agreements—unlike the private settlements routinely examined and approved under *Independent Stave*—have the imprimatur and enforcement powers of the agency behind them.<sup>9</sup> They should thus be viewed as vehicles through which the General Counsel discharges his duties to the public.

The other error the ALJ made in analyzing the first *Independent Stave* factor was faulting the General Counsel for obtaining settlement approvals from only three (3) of the twenty (20) discriminatees. In making this criticism, the ALJ failed to appreciate (a) that these agreements provide full backpay to all discriminatees and (b) the discriminatees who were not consulted by the General Counsel were not entitled to a reinstatement or restoration remedy.<sup>10</sup> Backpay and reassurance of their right to engage in Section 7 activity are the only remedies they could receive. Because the settlements provide complete remedies to these individuals in both respects, a refusal to be bound on the part of those individuals would not be entitled to any

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<sup>7</sup> 29 U.S.C. § 153.

<sup>8</sup> *Philip Carey Mfg. Co., Miami Cabinet Div. v. NLRB*, 331 F.2d 720, 730 (6th Cir. 1964) (“The General Counsel, like the Board, is charged with the responsibility of representing the public interest, not that of private litigants.”).

<sup>9</sup> Case Handling Manual (Part 1), Unfair Labor Practice Proceedings, Section 10146.1 (“An informal settlement agreement is a Board document providing that the charged party will take certain action to remedy the unfair labor practices deemed meritorious.”).

<sup>10</sup> They had either suffered a discrete suspension the monetary loss from which was fully remedied by backpay or had suffered a loss of hours in their week-to-week schedules which had been restored before this litigation began.

weight. Such refusal would amount to insistence that the General Counsel continue to litigate even though the particular interests of the objecting parties had been fully protected. The question of whether they “agreed to be bound,” therefore, makes no sense; it implies they ceded something of value in these agreements, which these individuals did not.

The three discriminatees who had something to consider, i.e., those who were in a position to be reinstated, agreed to waive that right in exchange for monetary premiums. All could have insisted on being reinstated to their former (or substantially similar) jobs. That prospect—that a discriminatee may be giving up something of value, either a job or backpay—is what animates the Board’s view that discriminatees’ views on a settlement be obtained.<sup>11</sup> The absence of that prospect should obviously counsel against such an exercise, which would in that case be a waste of agency resources, an outcome the General Counsel is expressly trying to avoid.

#### **4. The Reasonableness of the Settlements**

The ALJ criticizes the following features of the settlements or the General Counsel’s agreement to them, concluding that, collectively, they make the settlements unreasonable within the meaning of *Independent Stave*:

1. General Counsel’s acceptance of informal rather than formal settlements;<sup>12</sup>
2. Absence of successors and assigns language;<sup>13</sup>

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<sup>11</sup> See *Flint Iceland Arenas*, 325 NLRB 318, 320 n.6 (1998)(“We do not suggest that all discriminatees must be notified and agree to be bound for the Board to approve a settlement.”).

<sup>12</sup> Settlements Order, pp. 24–5.

<sup>13</sup> *Id.* at 27.

3. A purported difference in remedial effect between the mechanics of the settlements and inclusion of a statement that McDonald's would be jointly and severally liable or serve as guarantor;<sup>14</sup>
4. Absence of electronic notice posting;<sup>15</sup>
5. Supposedly inconsistent statements by the General Counsel and Respondents regarding Respondents' obligations under the settlements;<sup>16</sup>
6. The prior General Counsel's rejection of settlements on allegedly similar terms;<sup>17</sup>
7. The timing of withdrawal of the complaints;<sup>18</sup>
8. McDonald's role in countering the Fight for \$15 campaign;<sup>19</sup> and
9. The failure to complete the record or clarify joint employer law in the franchising context, i.e., the stage of the litigation.<sup>20</sup>

Not one of the foregoing supports the ALJ's conclusion. General Counsel addresses each of these rationales in turn.

a. Formal v. Informal Settlement Agreements

To begin, the ALJ seems to contend that informal settlement agreements are highly disfavored after a complaint has issued. She cites two facts in support of this position, namely,

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<sup>14</sup> *Id.* at 22–4.

<sup>15</sup> *Id.* at 31–2.

<sup>16</sup> *Id.* at 27–30.

<sup>17</sup> *Id.* at 32.

<sup>18</sup> *Id.* at 26–7.

<sup>19</sup> *Id.* at 33–6.

<sup>20</sup> *Id.* at 36–8.

Section 101.9(b)(1) of the Board’s Rules and Regulations<sup>21</sup> and Charging Parties’ contention that McDonald’s USA and some of Franchisee Respondents should be considered repeat offenders.<sup>22</sup>

The first factor on which the ALJ relies provides little to no support for disapproving the settlements based on their informal rather than formal nature. First, Section 101.9(d)(1) of the Board’s Rules and Regulations<sup>23</sup> plainly contemplates ALJ approval of informal settlements after hearing has begun.<sup>24</sup> Second, the Board has repeatedly and routinely approved non-Board and informal settlements in cases pending before an ALJ.<sup>25</sup>

The second basis, the “repeat offender” claim, is unpersuasive and puzzling. While the ALJ cites a definition of that phrase set forth in Memorandum GC 18-03 as “the universe of charged parties who have been found to have violated the Act by a Regional Office in the recent past,” she appears to rely on the (thus-far) unproven allegations of various complaints as evidence that some of the Respondent Franchisees “have been found to have [previously]

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<sup>21</sup> 29 C.F.R. § 101.9(b)(1).

<sup>22</sup> *Id.* at 25.

<sup>23</sup> 29 C.F.R. § 101.9(d)(1).

<sup>24</sup> That rule covers all settlements concluded “after the opening of the hearing and before issuance of the administrative law judge’s decision.” The rule begins with the procedure for an all-party informal settlement, turns next to the case of an all-party formal settlement, and ends with the process for all settlements between fewer than all the parties.

<sup>25</sup> E.g., *Shine Bldg. Maintenance, Inc.*, 305 NLRB 478 (1991) (affirming, over exceptions of charging party union, ALJ approval of informal settlement agreements); *Kiss Electric, LLC*, 2017 WL 2794211 (NLRB June 27, 2017) (denying appeal by General Counsel on the merits and approving settlement agreement); *Greenboro News & Record*, 239 NLRB 1243 (1989) (Board approves ALJ dismissal of complaint in light of remedial efforts Respondent had undertaken pursuant to informal settlement agreement terms); *Arizona Daily Star*, 2011 WL 5869215 (NLRB Nov. 18, 2011) (denying General Counsel’s appeal of ALJ approval of settlement agreement); *United States Postal Service*, 2016 WL 4036990 (NLRB July 27, 2016) (denying General Counsel appeal on the merits, Board affirms ALJ’s approval of “non-Board settlement agreement settling the complaint allegations”); *Service Merchandise Co., Inc.*, 299 NLRB 1132 (1990) (Board approves ALJ grant of summary judgment and dismissal of complaint based on non-Board settlement); *Food Services of America, Inc.*, 365 NLRB No. 85 (2017) (approving remand of case and withdrawal of complaint after issuance of Board decision).

violated the Act.” However, because formal settlements containing non-admissions clauses and informal settlements generally “have no probative value in establishing that violations of the Act have occurred,”<sup>26</sup> unadmitted complaint allegations are *a fortiori* equally insufficient to establish prior Act violations.

The ALJ’s reasoning regarding McDonald’s USA, LLC is even more obscure, since she relies on “the similarity of the violations alleged at [McDonald’s Restaurants of Illinois] to those which took place at other Charged Party locations.”<sup>27</sup> The ALJ thereby seems to be identifying, on the one hand, McDonald’s USA, LLC/McDonald’s Restaurants of Illinois, with, on the other hand, various Franchisee Respondents to conclude that “a formal settlement rather than an informal agreement is appropriate here.”<sup>28</sup> But (alleged) conduct by one Charged Party does not demonstrate a violation of the Act on the part of another, different Charged Party. In fact, the purpose of this entire section of the ALJ’s order is unclear, given her unambiguous statements elsewhere that there is no evidence any of the Respondents engaged in a history of violations of the Act or breached previous settlement agreements.<sup>29</sup> Thus, the fact that the General Counsel concluded informal rather than formal settlements with the Respondents in this case is of little to no effect in deciding whether they were reasonable.

b. Settlement Compliance Mechanisms v. Joint and Several Liability/Guarantee

The ALJ criticizes the failure of the settlements to, in her estimation, accomplish what could be done by imposition of joint and several liability upon McDonald’s USA or by making it

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<sup>26</sup> E.g., *Sheet Metal Workers Local 28 (Astoria Mechanical)*, 323 NLRB 204, 204 (1997).

<sup>27</sup> Settlements Order, p. 26.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, pp. 18 and 39.

a “guarantor” in the manner approved in *UPMC*. That criticism appears to misunderstand the effects of the settlements and Respondents’ steps toward compliance.

First, it is important to note that every Respondent who owed backpay under a settlement agreement gave the relevant Regional Director certified checks for all the backpay due under the agreement before the ALJ was asked to approve it. This fact was noted for the ALJ in McDonald’s USA’s brief in support of the settlements.<sup>30</sup> Further, as noted by counsel for the General Counsel, there is no discriminatee who has yet to be reinstated or have her work conditions restored, because either (i) the discriminatee has waived reinstatement in exchange for a premium, (ii) the discriminatee no longer works for the Respondent, or (iii) the discriminatee has already had her working conditions restored.<sup>31</sup> Thus, imposing joint and several liability upon McDonald’s USA for reinstatement, restoration of work conditions, or backpay would be entirely empty. Because the relief would already have been provided, joint and several liability would impose no additional obligation upon McDonald’s. Thus, the absence of joint and several liability has no remedial effect in those respects and its inclusion would be an empty gesture.

The remaining obligations of the Franchisee Respondents are (i) notice posting, (ii) rescission of work rules or policies that have not already been eliminated, and (iii) abstention from future violations, none of which McDonald’s can accomplish directly itself. Though General Counsel agrees with the Administrative Law Judge that McDonald’s USA has the

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<sup>30</sup> Exhibit B, McDonald’s USA, LLC’s Motion to Approve Settlement Agreements (McDonald’s Motion), p. 4 (Mar. 19, 2018) (“Charged Franchisees subject to Section 8(a)(3) allegations have already deposited funds with Regional Directors sufficient to provide complete[] make-whole relief to all alleged discriminatees”).

<sup>31</sup> Exhibit C, General Counsel’s Brief in Support of His Motion to Approve the Settlement Agreements (GC Motion), pp. 2–3 (Apr. 27, 2018).

leverage, through mechanisms like the Franchise Agreement, to convince a Franchisee Respondent to live up to its obligations under the relevant settlement agreement,<sup>32</sup> that is distinct from McDonald's itself providing the relevant relief, as would be contemplated by making it separately (severally) liable for those remedies.

As General Counsel pointed out in his motion seeking approval of the settlements, the Board has recognized that joint and several liability does not entail that every party is in a position to implement every remedy.<sup>33</sup> Thus, the ALJ's point that the Board imposed joint and several liability in the case cited by the General Counsel misses the import of his argument, to wit, that in some case such liability is causally empty and hence of no remedial effect. In light of those facts, the ALJ's criticism reduces to the observation that the settlements fail to include certain language, viz., the words "jointly and severally liable," regardless of their lack of remedial significance.

Moreover, the Special Notice provides the means for McDonald's USA to implement an equivalent remedy following a Respondent Franchisee's failure in nearly all these regards. Thus, if a Franchisee were to fail to post the notice required under a settlement, the first sentence of the Special Notice distributed by McDonald's USA would read, "A Regional Director of the National Labor Relations Board has investigated an unfair labor practice charge alleging that [insert franchisee name] violated the National Labor Relations Act by failing to post the enclosed Notice." Thus, McDonald's USA would, by issuing the Special Notice, distribute to employees the notice the franchisee had failed to post and thereby apprise employees of its contents.

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<sup>32</sup> Settlements Order, p. 24

<sup>33</sup> GC Motion, pp. 13–14, citing *Skill Staff of Colorado*, 331 NLRB 815 (2000).

Because that remedy is all but identical to what the Respondent Franchisee would have been obligated to do, no additional remedial effect would be achieved by making McDonald's USA jointly and severally liable for the original relief. Similarly, if a Respondent Franchisee were to continue to maintain a work rule it was obligated to rescind, the Special Notice would inform employees that McDonald's USA disavowed the rule and that its maintenance by the Franchisee Respondent was unlawful conduct. Again, the remedy implemented by McDonald's USA would be equivalent to that which should have been provided by the Franchisee Respondent and no additional remedial effect would result by making McDonald's USA jointly and severally liable. The same sequence of events would apply for a Franchisee Respondent's uncured breach by engaging in an unlawful threat, promise, interrogation, and the like.

Thus, the only circumstance in which issuance of the Special Notice would not provide a remedy equivalent to what would be achieved through Franchisee compliance would be an unlawful change in an employee's work conditions, including by discipline. Yet the Settlement Fund goes quite some distance toward making the affected employee whole and issuance of the Special Notice would provide the other employees reassurance of their rights to engage in Section 7 conduct.

In short, the ALJ's conclusion that the undertakings by McDonald's USA under the proposed settlements fall short of joint and several liability is largely incorrect. To the limited extent there is a difference between joint and several liability and the obligations imposed on McDonalds' by the settlements, that difference is a small concession by the General Counsel in return for achieving an otherwise full remedy of all the allegations of the Consolidated Complaint in this matter.

The ALJ also criticizes the failure of the settlements to use the word “guarantor,” concluding that “McDonald’s obligations under the Settlement Agreements are...not comparable in any way, shape, or form...to the guarantee of performance...in *UPMC*.”<sup>34</sup> That statement fails to come to grips with the very different stages of settlement in this case and the *UPMC* decision. As noted above, the settlement in this case would result in the provision of full backpay to all 20 discriminatees and notice posting immediately upon approval by the ALJ or Board. In *UPMC*, in contrast, the guarantee the parent company gave was only for those “remedial aspects of the Administrative Law Judge’s Decision and Order which survive the exceptions and appeals process.”<sup>35</sup> In other words, the scope of the guarantee by UPMC was uncertain because the parties could not know what remedies imposed by the Administrative Law Judge the Board and a Court of Appeals would eventually affirm. Additionally, that guarantee postponed implementation of any remedy for an indeterminate period—possibly forever—because the timing of the Board’s decision order was unknown and the respondents could subsequently seek review of any such determination before a Court of Appeals. In contrast, the settlements for which the General Counsel seeks approval would result in prompt and complete remedies and explicitly delineate what McDonald’s USA must do to effectuate them. Thus, to the extent McDonald’s obligations are “not comparable...to the guarantee...in *UPMC*,” it is the UPMC guarantee which suffers by the comparison.

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<sup>34</sup> Settlements Order, pp. 22–3.

<sup>35</sup> *UPMC*, 365 NLRB No. 153, slip op. at 2 and 7 (Dec. 11, 2017).

c. Absence of Successors & Assigns Language

Successors and assigns language is routinely absent from informal settlement agreements.<sup>36</sup> In the present case, however, the General Counsel has, in various of the settlement agreements, implemented processes which serve the same purpose as such language. Thus, in some cases where a Respondent Franchisee no longer operates the facility at which the alleged unfair labor practices occurred, the settlement agreements provide for mailing the notices to the relevant affected employees.<sup>37</sup> At other locations, the Franchisee Respondents remained responsible for posting of the notices at the relevant location despite not operating that facility any longer.<sup>38</sup>

Further, as noted above, Franchisee Respondents made the backpay due the alleged discriminatees available even before the ALJ was asked to approve the settlements. Thus, requiring the settlement agreements to impose liability upon the Respondent's successors or assigns for such backpay would be an empty gesture. The same is true for operation of the Settlement Fund described in the settlement agreements. Consequently, the concern for existence of "stable corporate entities with substantial assets" is entirely missing. Access to additional assets is entirely unnecessary under the proposed settlements.

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<sup>36</sup> To some extent, then, the absence of successors and assigns language is encompassed by the ALJ's objection to the fact that the proposed settlements are informal rather than formal.

<sup>37</sup> E.g., McDonald's Motion, Exhibit 17 (Wright Management, Case Nos. 13-CA-107668 and 13-CA-113837).

<sup>38</sup> E.g., McDonald's Motion, Exhibits 5, 6, 7, and 8 (AJD, Inc., Case Nos. 02-CA-093895 and 02-CA-097827; John C. Food Corp, Case Nos. 02-CA-093927 and 02-CA-098659; 18884 Food Corp, Case Nos. 02-CA-094224 and 02-CA-098676; 14 E. 47<sup>th</sup> Street, LLC, Case Nos. 02-CA-098604 and 02-CA-094679).

Like the ALJ's critique of the General Counsel's selection of informal over formal settlements, then, the absence of successor and assigns language from the settlements holds little to no significance and the ALJ's reliance on that fact is misplaced.<sup>39</sup>

d. Electronic Notice Posting

The ALJ faults the General Counsel for not including electronic notice posting in the proposed settlements. This criticism rests on a misreading or mischaracterization of the evidence adduced during hearing and what appears to be a misunderstanding of *J. Picini Flooring*. Starting with the latter, the ALJ writes, "*J. Picini Flooring* does not involve an assessment as to 'the best way to inform employees.'"<sup>40</sup> That statement ignores the basis of the Board's decision in that case, which rested on the conclusion that "to achieve [the Act's] remedial goals, notices must be adequately communicated to the employees or members affected by the unfair labor practices."<sup>41</sup> Given that purpose and the Board's observation that "email, postings on internal and external websites, and other electronic communications tools are overtaking" paper notices, paper memos, and bulletin boards as the way in which employers communicate with workers, the Board concluded that "efficacy of the Board's remedial notice is in jeopardy."<sup>42</sup> In short, the entire point of the decision in *J. Picini Flooring* was concern for "the best way to inform

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<sup>39</sup> Given the foregoing and the fact that the Respondent Franchisees in this case are all corporate entities of one kind or another, and thus only able to act through representative individuals such as its officers and agents, it is perhaps unsurprising the ALJ did not identify any way in which the absence of successors and assigns language would result in a lesser remedy for the affected employees, less protection of their Section 7 rights, or failure to promote the public interest in enforcing the policies of the Act.

<sup>40</sup> Settlements Order, p. 32.

<sup>41</sup> 356 NLRB 11, 12 (2010).

<sup>42</sup> *Id.* at 11 and 12.

employees.” Thus, the General Counsel’s rationale for using paper notices in this case respects the policy goals the Board advanced in *J. Picini* while the ALJ’s reasoning appears to discount it.

The ALJ appears to attach significance to evidence that McDonald’s USA electronically transmitted certain labor relations materials to the Franchisee Respondents.<sup>43</sup> But that fact is irrelevant, both because the Franchisee Respondents are not the affected employees to whom the notices must be communicated and because the materials identified by the ALJ were in fact communicated to employees through paper.<sup>44</sup> Employee schedules were also given to workers in paper format,<sup>45</sup> and Franchisee owners testified about physically posting notices to employees about contests<sup>46</sup> and, among other things, giving paper instructions to employees about uniform options,<sup>47</sup> credit card processing,<sup>48</sup> and a bonus program.<sup>49</sup> And, while it is true that some employee training was done through McDonald’s Connection computers, the evidence is that such training was the only material available to employees on that device.<sup>50</sup> Thus, the evidence is far from establishing that the Franchisee Respondents customarily communicated with employees through electronic means and the available evidence is in fact to the contrary.

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<sup>43</sup> Settlements Order, p. 31 (referring to mention of the “9-in-1” posters and No Solicitation signs at p. 24 and n. 54 of her order).

<sup>44</sup> See, e.g., Tr. 1648:12–18 (testimony of former VP of Human Resources that the 9-in-1 poster was required to be displayed in the crew room and that no solicitation stickers were meant to be posted on facility doors), attached as Exhibit D.

<sup>45</sup> See, e.g., G.C. Exh. Lewis 39.25 (recommending franchisees cease posting employee schedules as a whole and instead “cut[] out the section that is specific for each employee”), attached as Exhibit E.

<sup>46</sup> Tr. 17293:3–23, attached as Exhibit F.

<sup>47</sup> Tr. 17295:9–17296:6, attached as Exhibit G.

<sup>48</sup> Tr. 17300:1–17, attached as Exhibit H.

<sup>49</sup> Tr. 17301:19–17302:12, attached as Exhibit I.

<sup>50</sup> E.g., Tr. 10697:11–14 (testimony by McDonald’s USA field service consultant Stephen Monahan characterizing McDonald’s Connection as an “E-Learning Computer”), attached as Exhibit J; Tr. 5627:2–5 (testimony by McDonald’s USA technology development director characterizing McDonald’s Connection as computer used to facilitate crew training), attached as Exhibit K.

Finally, the ALJ appears to fault the General Counsel for not undertaking a compliance investigation as to whether the methods by which the Respondents communicate with their employees has changed since the time at which the alleged unfair labor practices occurred, noting that the appropriateness of electronic posting pursuant to *J. Picini* is, in litigated cases, generally determined at the compliance stage of proceedings.<sup>51</sup> But settlement negotiations do not include the opportunities to collect and present evidence available in compliance proceedings. Further, and perhaps more significant, the *Picini Flooring* decision does not suggest that evidence about how an employer communicates with its workforce adduced at the compliance stage is somehow more relevant or able to better effectuate the purposes of the Act than evidence from some other portion of the case. Rather, that aspect of *Picini Flooring* was primarily a rejection of the proposal that the General Counsel be required to adduce evidence on that issue during the unfair labor practice portion of the case, thereby adding an extra element of proof to the liability phase of every Board trial.<sup>52</sup>

As a result, this feature of the settlement—the use of in-store posting and direct mailing rather than electronic posting which has not been shown to be appropriate in this case—provides no basis for the ALJ’s rejection of the settlements.

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<sup>51</sup> Settlements Order, p. 32.

<sup>52</sup> *J. Picini Flooring*, 356 NLRB at 12 and 14 (“[Respondents and supporting amici] further argue that the General Counsel should bear the burden of establishing that electronic posting is warranted, and that any necessary factual showing should be made during the unfair labor practice hearing...[W]e hold that whether a respondent customarily uses a particular electronic method in communicating with employees or members, whether electronic notice would be unduly burdensome, and other matters bearing on whether electronic posting is appropriate in a particular case, may be resolved at the compliance stage.”) (emphasis added).

e. The General Counsel's and McDonald's USA's Descriptions of the Settlements

The statements of McDonald's and the General Counsel regarding the operation of the settlements were not, as claimed by the ALJ, contradictory.<sup>53</sup> Her conclusion that they were indicates a misreading of the cited statements. As demonstrated below, a more natural reading of the parties' representations resolves the perceived conflicts.

The ALJ described the parties as making incompatible assertions regarding two aspects of the settlements: (i) the default provisions and (ii) operation of the settlement fund.

On the first, the ALJ first characterizes the General Counsel as having taken conflicting positions:

General Counsel represented on March 19, 2018 that pursuant to the Settlement Agreements' default provisions if a Franchisee Respondent fails to cure an alleged breach of a Settlement Agreement, "It then turns to McDonald's U.S.A. to remedy or implement the remedy that the Franchisee failed to," i.e. McDonald's would be responsible for effecting whatever remedy the Franchisee Respondent had not performed. However, on April 5, 2018, General Counsel depicted McDonald's obligations when a Franchisee Respondent fails to cure a breach of the Settlement Agreement as significantly more limited. Specifically, General Counsel described McDonald's failure to remedy a Franchisee Respondent's breach of the Settlement Agreement solely as "failing to mail the Special Notice." Thus, if a Franchisee Respondent failed to cure a breach of the Settlement-Agreement, McDonald's would only be required to mail out the Special Notice, as opposed to implementing the remedy initially required of the Franchisee Respondent. As a result, because the language of the Settlement Agreement did not change after March 19, 2018, General Counsel appears to have significantly misunderstood the scope of McDonald's responsibilities under the default provisions.<sup>54</sup>

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<sup>53</sup> See, e.g., *id.*, p. 19 ("both General Counsel and McDonald's have made contradictory representations on the record and in their Briefs regarding the Settlement Agreements' provisions and McDonald's obligations.") and p. 28 ("based on the array of conflicting contentions advanced by General Counsel and McDonald's regarding McDonald's obligations in lieu of a finding of joint employer status, it appears that the parties' understanding of the Settlement Agreements' terms is incomplete or at odds.").

<sup>54</sup> Settlements Order, p. 28.

The judge accurately quoted counsel for the General Counsel at the March 19 hearing. She did not, however, interpret that statement reasonably.<sup>55</sup> The March 19 quotation was, as General Counsel noted at the time, part of a “summary of the structure” of the settlements.<sup>56</sup> The point was to give the ALJ a guide to assist her in reading and reviewing the settlements later, as it appeared she acknowledged.<sup>57</sup> Thus, the emphasis in the passage from which the ALJ selected the quote was on the process and overall form of the agreements.

Further, there is an obvious sense in which the General Counsel’s statement was correct. If a Respondent Franchisee commits an 8(a)(1) violation that breaches the settlement and fails to cure by providing the proper assurances to employees, it falls on McDonald’s to provide those assurances by issuing the Special Notice. Similarly, if a Respondent Franchisee commits an 8(a)(3) settlement breach by firing, suspending, or reducing the hours of an employee and fails to rescind that discipline, McDonald’s triggers disbursement from the settlement fund as a substantial step toward making that employee whole.

The April 5 statement occurred in different circumstances. In that case, the General Counsel was responding to a question from the ALJ about “what specifically constitutes a failure by McDonald’s to cure a breach.”<sup>58</sup> In that context, the General Counsel confirmed the ALJ’s understanding that McDonald’s responsibility was to issue the Special Notice. To the extent that

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<sup>55</sup> Indeed, the fact that she recast the statement in order to find a contradiction suggests that, without such reinterpretation, the statements the General Counsel actually made would naturally be read as consistent.

<sup>56</sup> Tr. 21197:22–24, attached as Exhibit L.

<sup>57</sup> Tr. 21197:25–2198:1 and 21199:18–19 (“I mean, I’m obviously not going to have time to look at this now, but go ahead” and “Not having read it—I mean, I’m going to read the whole thing.”) , attached as Exhibit M.

<sup>58</sup> Tr. 21246:15–22, attached as Exhibit N.

later quoted statement differed from the earlier, however, the reasonable conclusion was not that General Counsel misunderstood McDonald's obligations under the terms of the agreement. Instead, the natural and plausible conclusion is that on April 5 the General Counsel was carefully answering the ALJ's question while the March 19 statement was designed to give a general characterization of the settlement. The difference between the two statements by the General Counsel is most naturally attributable to those two different purposes rather than to a sudden change in his interpretation of the operation of the settlement agreement he spent two months negotiating.

The ALJ also claimed the parties' statements regarding disbursement from the settlement fund demonstrated inconsistent understandings.

The Settlement Agreements state that McDonald's "shall deliver to" the Board "funds provided by the franchisees in the amount of \$250,000" to comprise the Settlement Fund, and that any unused balance of the Fund will be returned to McDonald's "for distribution to the appropriate franchisee." McDonald's reiterated as much in its Motion to Approve, submitted on March 19, 2018. At the hearing on March 19, 2018, General Counsel described the Settlement Fund as "McDonalds U.S.A.'s set up for helping cure monetary remedies that would be part of a breach." However, when questioned by me on April 5, 2018, McDonald's counsel denied that the company was "coordinating logistically . . . the contributions to and the operations of the settlement fund." McDonald's counsel contended that the Respondent Franchisees would make contributions to the Settlement Fund and the Regional Directors would make disbursements from it, claiming, "We don't have anything to do with it." General Counsel's Post-Hearing Brief, however, described McDonald's role in the Settlement Fund's operations as even more extensive than his representations on the record. In his Post-Hearing Brief, General Counsel asserted that McDonald's will not only collect and return any unused "contributions" to the Settlement Fund, but that McDonald's itself will determine when a disbursement from the Settlement Fund is warranted:

The settlement agreements impose the responsibility for the fund on McDonald's. McDonald's was obligated to collect and deliver the \$250,000 being placed in the fund *and has the responsibility for deciding whether and when to trigger any disbursement from*

*the fund. See, e.g., "Settlement Fund" section in GC Exhibit Settlement 1.*<sup>59</sup>

On that basis, the ALJ concluded, “These conflicting accounts evince a substantial and troubling level of confusion among the parties regarding McDonald’s role in the establishment and operations of the Settlement Fund.”<sup>60</sup> She also wrote, “General Counsel’s description of McDonald’s authority with respect to disbursements from the Settlement Fund as essentially discretionary also contradicts the parties’ earlier statements construing disbursements as mandatory in the context of the default process.”<sup>61</sup> The ALJ thus read McDonald’s counsel’s and the General Counsel’s statements as contradictory with respect to (1) whether McDonald’s was responsible for establishing the Settlement Fund and (2) whether disbursement from that fund was mandatory. Again, context demonstrates the absence of inconsistency.

To begin, the question of whose money goes into the Fund or how those checks were collected is immaterial to the actual operation of the Fund. More to the point, however, the important facts are not in dispute: McDonald’s was responsible for delivering that money to the agency<sup>62</sup> and that money was, in fact, delivered.

In fact, the ALJ was or should have been aware the quoted statement by McDonald’s counsel inaccurately portrayed McDonald’s role in establishing the Fund. In the foregoing passage from her order, the ALJ started by quoting the settlement agreement passage which explicitly set forth that McDonald’s was the party responsible for delivering the Settlement Fund

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<sup>59</sup> Settlements Order, pp. 28–9 (emphasis in original).

<sup>60</sup> *Id.*, p. 29.

<sup>61</sup> *Id.*

<sup>62</sup> See, e.g., McDonald’s Motion, Exhibit 1 (“Upon execution of this Agreement, McDonald’s USA, LLC shall deliver to the National Labor Relations Board (‘Board’) funds provided by the franchisees in the amount of \$250,000 . . .”)

money. The ALJ acted unreasonably in concluding that McDonald's counsel's understanding of the settlement varied from that simple and clear statement in the agreement itself. Moreover, other of McDonald's counsel's statements demonstrated that his understanding of the settlement was consistent with that plain language. Immediately after the statement of McDonald's counsel quoted by the ALJ, the two engaged in the following exchange:

JUDGE ESPOSITO: I'm sorry, I thought that the – I thought it was triggered by McDonald's providing the special notice.

MR. GOLDSMITH: No, that was -- McDonald's provides a special notice if the franchisee doesn't cure, if you will, on its own.

JUDGE ESPOSITO: No, what I mean is that it says disbursement from the settlement fund to the alleged discriminatees will be triggered when McDonald's U.S.A. notifies the Regional Director that McDonald's U.S.A. will issue the special notice.

MR. GOLDSMITH: Right and that directs the Regional Director to handle the funds and make a judgment about whatever the back pay is if that's what's at issue and all we do is say what the facts were.

JUDGE ESPOSITO: Okay. Thank you.<sup>63</sup>

This exchange shows that McDonald's counsel at first overstated his client's lack of involvement in the disbursement of funds—the line highlighted by the judge—but clarified his client's involvement under questioning.

That clarification is also entirely consistent with the section of General Counsel's post-hearing brief which the judge italicized for emphasis, which says that McDonald's has the responsibility for deciding whether and when to trigger a disbursement. In both readings, McDonald's decides whether to issue the Special Notice. That decision triggers a disbursement

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<sup>63</sup> Tr. 21318:10-21319:2, attached as Exhibit O.

of funds. Funds will not be disbursed unless McDonald's issues the Special Notice. Accordingly, under the terms of the settlement McDonald's decides whether and when to trigger a disbursement for the fund. However, McDonald's must take that action, if it is to avoid a default judgment against it, which would include a finding that it is a joint employer with the relevant Franchisee Respondent. Thus, disbursement from the Settlement Fund is mandatory if McDonald's is to avoid default judgment in case of an uncured breach but it is McDonald's choice whether to accept default judgment against it or instead trigger Fund disbursement by issuing the Special Notice.

In short, the ALJ's argument that the parties' statements demonstrate incompatible understandings of the settlements depends on unnatural readings of those statements. Those readings ignore context and evidence to the contrary and strain to avoid ascribing a consistent position to the General Counsel. Given that the ALJ appears confident in her interpretation of the Settlement Agreements, it is perplexing she concluded that General Counsel did not have an equally clear understanding. Because the ALJ's characterizations of the parties' understanding of the settlements were not reasonable, those characterizations do not provide justification for her disapproval of the settlements.

f. The Alleged Similarity of the Settlements to What the ALJ Concluded Could Have Been Reached Pre-Trial

In her order, the ALJ contends the settlement agreements "do not appear to accomplish anything more than what ostensibly could have been achieved prior to the start of the three-year

hearing in this matter.”<sup>64</sup> In addition to making assumptions about counterfactual circumstances, that statement also appears to misunderstand or ignore the representations of the General Counsel.

First, the ALJ reads too much into the transcript portions she cites. The transcript sections at pages 112, 1012–3, 21254–6, and 21260–4 do not, to the General Counsel’s reading, indicate that any of the Franchisee Respondents, much less all of them, offered to fully remedy the unfair labor practice allegations. Rather, the limited import of those cited passages is that settlement negotiations did not proceed very far because the then-General Counsel was seeking an admission of joint employer status on the one hand and McDonald’s, on the other, was seeking to be dismissed from the proceedings entirely.<sup>65</sup> Thus, the evidence does not indicate that the General Counsel could have, in 2014 or 2015, obtained the relief from the Franchisee Respondents he did in 2018.

Second, the available evidence shows that the General Counsel obtained settlement concessions and participation from McDonald’s which were not “on the table” before trial. In fact, the negotiation timeline described by counsel for the Charging Parties<sup>66</sup> suggests that McDonald’s USA participation in settlement was instrumental in obtaining Franchisee Respondent agreement to the agreement terms. According to that account, all but the final week of two months of negotiations were spent dealing with McDonald’s, while negotiations with all

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<sup>64</sup> Settlements Order, p. 32.

<sup>65</sup> Tr. 21256:14–18 (“My recollection, Your Honor, is th[at] McDonald’s USA...—and Mr. Goldsmith can correct me if I’m misremembering...their proposal was to...be dismissed from the case and [for General Counsel] to settle with the franchises directly and to drop the joint employer allegation”), attached as Exhibit P.

<sup>66</sup> Tr. 21201:21–21202:14 (Charging Party counsel describing the progress reports he received from General Counsel), attached as Exhibit Q.

of the Franchisees took about a week.<sup>67</sup> That suggests that McDonald's USA persuaded the Franchisee Respondents to accept the settlement terms, including full backpay, proposed by the General Counsel, a role and result that would not have been possible if McDonald's had been dismissed from the case and General Counsel had entered independent negotiations with each Respondent Franchisee.

Because the facts fail to support the ALJ's assertion that the terms of settlement could have been achieved earlier and in fact undermine that conclusion, that claim provides no basis for withholding approval of the settlements.

g. The Timing of Complaint Withdrawal Under the Settlements

The ALJ asserts that complaint withdrawal under the terms of the settlement, i.e., ten days after settlement approval, would be "manifestly unreasonable."<sup>68</sup> But the reasons she provides for that conclusion—complaint withdrawal typically occurs after full compliance and significant effort was expended on litigating these cases—do not provide any obvious support for it. Further, there is a practical explanation for this aspect of the settlement, which is related to another settlement feature the ALJ found objectionable, namely the conclusion of separate settlement agreements with the various Respondent Franchisees, notwithstanding the General Counsel's 2015 consolidation of those cases.<sup>69</sup>

General Counsel consolidated the cases in this matter primarily because of the commonality of the evidence relevant to the issue of whether McDonald's USA stood in a joint

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<sup>67</sup> *Id.*

<sup>68</sup> Settlements Order, pp. 26–7.

<sup>69</sup> *Id.*, p. 32.

employer relationship with each of the various Franchisee Respondents.<sup>70</sup> Plainly, however, presentation of such evidence is not an issue with respect to the settlement agreements. Thus, the reason for consolidation for trial is not a reason to keep the cases consolidated during settlement. Further, keeping the cases consolidated in the structure of the settlement would have required every Region involved in these matters to consult and coordinate with the other such Regions regarding the status of compliance (rather than making each Region the judge of and responsible for compliance of just those cases for which it had authorized complaint). It was reasonable for the General Counsel to judge that he could better monitor compliance with the settlement agreements if doing so did not require that level of inter-Regional coordination.

Keeping the cases consolidated would also mean that a breach of any settlement provision by a single Franchisee Respondent would constitute a breach of the entire agreement. Thus, a breach by one Respondent Franchisee would have led to default on all the allegations of the Consolidated Complaint, including the joint employer allegations. That, in turn, would have given non-breaching Franchisee Respondents and McDonald's USA substantial motive to object to and litigate against a Regional Director's conclusion that the initial Franchisee had breached the settlement. That would have severely complicated administration of the default procedures that are a significant aspect of the agreements and which provide substantial incentive for compliance by the Respondents.

Therefore, the General Counsel judged it advisable to proceed on default against only the Franchisee Respondent(s) who had breached the terms of settlement and seek default judgment

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<sup>70</sup> *McDonald's USA, LLC*, 363 NLRB No. 91, slip op. at 1 (Jan. 8, 2016).

on just those allegations applicable to the breaching Franchisee(s). Withdrawing the Consolidated Complaint upon approval of the Settlements and, if necessary, re-issuing a new complaint containing only the allegations relevant to pursuit of default proceedings against the breaching Respondent constitutes a reasonable method to accomplish that end and is thus far from “manifestly unreasonable.” Consequently, the ALJ’s objection to this aspect of the settlements does not provide any justification for her refusal to approve the agreements.

h. McDonald’s Role in Responding to the Fight for \$15 Campaign

The ALJ recognizes that, like the *UPMC* case, the Consolidated Complaint in this matter does not allege McDonald’s is “primarily and directly liable” for any of the alleged unfair labor practices.<sup>71</sup> She nonetheless appears to conclude that because the General Counsel presented evidence regarding McDonald’s role in responding to the Fight for \$15 campaign—evidence which the ALJ recognized the General Counsel adduced to show that McDonald’s USA was a joint employer with the Franchisee Respondents and on that basis liable for unfair labor practices<sup>72</sup>—the significance the Board ascribed to the absence of allegations against *UPMC* is inapplicable to the present case.<sup>73</sup>

The ALJ does not point to any passage of the *UPMC* case to support this distinction. Further, by adopting that position she effectively concludes that McDonald’s has primary liability for these ULPs. The judge thereby treads on the Due Process Clause, which provides that a litigant must have notice and an opportunity to respond. Here, as she acknowledges, the

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<sup>71</sup> Settlements Order, p. 33.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*, p. 36 (“[T]he instant case is in this respect materially distinguishable from *UPMC*, where the putative single employer was a mere ‘bystander’ to the allegations”).

complaint did not accuse McDonald's of any ULPs. McDonald's therefore was never on notice that it may be primarily liable for ULPs, as opposed to vicariously liable by virtue of its joint employer relationship. While the evidence at trial suggests McDonald's role in the case was that of active participant, it was never formally accused of committing ULPs and Sec. 10(b) of the Act prevents such attribution. Moreover, while the General Counsel was far from pleased with McDonald's behavior during this trial, including its many frivolous positions, motions, and special appeals, the Board must bear in mind that the purpose of the Act is remedial, not punitive. *Philip Carey Mfg. Co., Miami Cabinet Div. v. NLRB*, 331 F.2d 720, 730 (6th Cir. 1964).

Thus, the presentation of evidence on the joint employer issue does not support the ALJ's rejection of the proposed settlements.

i. The Stage of the Litigation

The final factors in the ALJ's rejection of the proposed settlements are (i) the General Counsel's failure to hear the testimony of Professor Chekitan Dev, (ii) General Counsel's abandonment of one of the initial purposes in bringing this case<sup>74</sup> and (iii) the significant investment of time and resources already invested.<sup>75</sup>

The ALJ's argument regarding the first point is somewhat puzzling. While General Counsel agrees that testimony from Professor Dev would have illuminated the scope of McDonald's "brand protection" defense, the weight she ascribes to this fact appears to conflict

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<sup>74</sup> *Id.*, p. 39.

<sup>75</sup> Settlements Order, p. 40 ("Given the size and import of this case, the resources expended in the hearing presentations, . . . I find overall that approval of the Settlement Agreements is not warranted pursuant to the *Independent Stave* criteria.").

with her own decision to stay the case for settlement purposes. In her January 19, 2018 order she wrote, “[T]he timing of the requested stay is not optimal...Nevertheless, I find that the requested stay of the hearing is warranted.”<sup>76</sup> In support of that decision, the ALJ cited the possibility that settlement would resolve all the cases in the initial Consolidated Complaint, including those in the severed cases, the beliefs of General Counsel and Respondents that a stay would be conducive to successful settlement, and the fact that settlement would “obviate the significant work of preparing Post-Hearing Briefs and deferred objections.”<sup>77</sup>

The settlement efforts permitted by that stay produced the effects whose mere possibility the ALJ said warranted foregoing Professor Dev’s testimony. General Counsel therefore submits that if the possibility of producing these results warranted a stay, their actual result means the General Counsel’s decision was far from incomprehensible. The ALJ’s reliance on that supposed incomprehensibility in refusing to approve the settlement is therefore unpersuasive and should be discounted.

With respect to the second point, it is true, as described by the ALJ, that one of the General Counsel’s aims in bringing this case was to update the Act’s joint employer doctrine to better reflect modern business relationships, including that of franchisor-franchisee. The ALJ cites this initial purpose as justification to deny the General Counsel’s motion to approve these settlements because settling foregoes that initial purpose.<sup>78</sup>

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<sup>76</sup> Order Granting General Counsel’s Motion to Stay Proceedings (Jan. 19, 2018), pp. 1–2, attached as Exhibit R.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

This reasoning warrants various responses. First, the ALJ ignores that this case was brought by a different General Counsel under a different administration. The current General Counsel has a different view of the matter. His primary motivation is to remedy the unfair labor practices. As discussed above, these settlements—unlike the settlement in UPMC—would actually remedy the alleged ULPs. The remedies are not contingent on a later Board order, as are the remedies in the UPMC settlement. Those remedies would also not be enlarged by a joint employer finding, since joint employer status is not, by itself, an unfair labor practice.

Second, the ALJ overstepped her role in allowing this consideration—whether the General Counsel was accomplishing his goal to change law—to influence her decision. The main role of an ALJ, as defined at 29 C.F.R. § 102.35(a), is to “inquire fully into the facts as to whether the Respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint.” She, of course, is also tasked with approving settlement once a hearing opens, 29 C.F.R. § 101.9, applying the *Independent Stave* factors. But nowhere is her authority extended to considerations of whether a particular change in law is justified or whether a previous General Counsel’s pursuit of such a change is worth maintaining. By allowing that consideration to affect her judgment, the ALJ abused her discretion.

Third, there is no guarantee continuing the litigation will achieve the goal of the previous general Counsel to update and clarify joint employer law, especially as it applies in the franchisor-franchisee context. Indeed, the change in composition of the Board since this litigation began has made it much less likely that aim will be realized, particularly in light of the Board’s stated intent to re-visit the joint employer standard through the rule-making process. If the Board implements a joint employer standard through rule-making, that would supplant any

standard arising from litigation of this case. Any joint employer standard enunciated in this case, then, would be limited to this case and its effect would thus be minimal, given that the proposed settlements provide for a full remedy of the alleged unfair labor practices.

Finally, the ALJ points to the time and effort that has been spent litigating this matter as a reason to deny approving the settlements. While it is certainly true that the litigation thus far has been extensive, the ALJ gives little consideration to either the litigation that would ensue if there is no settlement or the risk of loss. As noted above, the ALJ herself recognized the effort that would be required to submit Post-Hearing briefs and prepare or respond to deferred objections. There would also be the decision the ALJ would be required to write, exceptions to the Board and briefs in support or in opposition to those, a Board decision, and appeals. Not only would those processes require considerable effort and expense on the part of the parties and the agency, they would substantially delay, possibly forever, any remedy for the alleged unfair labor practices. Further—and as previously noted—the legal landscape has changed in ways that make it substantially less likely the General Counsel would prevail if he were to continue to try this case.

### **III. Conclusion**

For all these reasons, the ALJ abused her discretion. The Board, therefore, should reverse her decision and approve these settlement agreements.

Dated: August 14, 2018

/s/ Jamie Rucker and Alejandro Ortiz

Jamie Rucker

Alejandro Ortiz

Counsel for the General Counsel

## **CERTIFICATE OF SERVICE**

The undersigned, an attorney for the General Counsel, hereby certifies that he caused a true and correct copy of General Counsel's Request for Special Permission to Appeal and Appeal of the Administrative Law Judge's Order Denying Motions to Approve Settlement Agreements to be electronically filed with the National Labor Relations Board on August 14, 2018 and served on the same date via electronic mail at the following addresses:

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